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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 528

SOUTHWEST FOREST INDUSTRIES, INC., Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 10, 1970.

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v.

WESTINGHOUSE ELECTRIC CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Southwest Forest Industries, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 9, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears in the Appendix hereto, pages i to xiii and is reported at 422 F2d 1013. The judgment of that Court

is printed in the Appendix hereto, page xiv. The Order and Judgment of the United States District Court for the District of Arizona is printed in the Appendix hereto at pages xv to xviii. The United States District Court for the District of Arizona rendered an unreported opinion, which is printed in the Appendix hereto at pages xix to xxxi.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 9, 1970. A motion to extend the time for filing a petition for rehearing was timely served on February 20, 1970, pursuant to Rule 40(a) Federal Rules of Appellate Procedure. An order was entered on February 28, 1970, extending the time for filing the petition for rehearing to March 25, 1970. The petition for rehearing was timely filed on March 25, 1970. Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on May 15, 1970. The jurisdiction of this Court is invoked under 28 USC § 1254(1). The 90-day period for filing this petition expires on August 13, 1970, and this petition is thus timely filed. *United States v. Healy*, 376 US 75, 77-79 11 LEd 2d 527, 531, 84 SCt 553; *Vine v. Beneficial Finance Company*, CA 2d, 1967, 374 F2d 627, 632.

QUESTION PRESENTED

When a vendor-manufacturer agrees to correct defects in workmanship and materials in the product sold, and limits its liability by providing (1) that such correction shall constitute a fulfillment of all its liabilities and (2) that it shall not be liable for consequential damages, has the consumer-purchaser been deprived of all remedies to recover damages caused by negligence of the manufacturer in attempted repair of defects?

STATUTORY PROVISION INVOLVED

Uniform Commercial Code:

§ 2-719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

STATEMENT OF THE CASE

In 1960, Southwest Forest Industries, Inc. [Southwest] instituted negotiations with Westinghouse Electric Corporation [Westinghouse] for the purpose of acquiring a steam turbine electricity generator, to be installed in a pulp and paper mill it was planning to construct. Ultimately Southwest did purchase the electricity generator from Westinghouse.

The trial court determined that a letter from Westinghouse to Rust Engineering, of May 18, 1960, contained the warranty of Westinghouse. That letter contained the following paragraph:

"In view of the fact that the proposed unit will be the only

source of electrical power for the Kraft and Newsprint Mill, we direct your attention to several Westinghouse features that contribute to the high reliability of our unit. We urge that these features be considered in your evaluation."

On the reverse side of that letter were printed contractual provisions among which was the Westinghouse exculpatory warranty as follows:

"WARRANTY — Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect of defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

The installation of the steam turbine generator was completed in October, 1961, and was put in operation in several stages through December of that year. Innumerable malfunctions immediately occurred preventing the operation of the steam turbine. The malfunctions were largely due to defects in the unit arising out of the failure of Westinghouse to clean mill cuttings and other foreign material from the sealed governor control hydraulic system. Westinghouse was notified of the defects and on numerous occasions ineffectively and negligently attempted repairs on the unit at the site.

The negligence of Westinghouse in performing its contractual obligation "to correct any defect or defects in workmanship or material" caused Southwest to sustain damages consisting of lost time, labor, materials and loss of business in that the failure of the generator prevented operation of the pulp and paper mill. Southwest then brought suit against Westinghouse invoking Federal jurisdiction upon diversity of citizenship under 28 USC § 1332.

This petition seeks review only of the following determination of law by the United States District Court:

"(3) the terms of the Westinghouse form of warranty and limitation of liability under Pennsylvania law are sufficient to limit Westinghouse liability so as to exclude recovery of consequential damages resulting from breach of express or implied warranty or from negligence, in the manufacture, installation, and *repair* of the turbine generator unit; (4) the damages claimed to have been suffered by the plaintiff in this case are consequential damages within the meaning of the Westinghouse form of warranty and Uniform Commercial Code Sec. 2-719;" (Emphasis added, Appendix pp. xxx-xxxi.)

On appeal to the United States Court of Appeals for the Ninth Circuit, the Appellate Court affirmed such finding stating:

"But the district court was correct in holding that the warranty precluded recovery for consequential damages resulting from negligence in repair." (Appendix, p. xi)

The effect of such determination is to exculpate Westinghouse from any damages arising out of negligent performance of its agreement "to correct any defect or defects in workmanship or material."

REASONS FOR GRANTING THE WRIT

1. INTRODUCTION.

This is a diversity case which was decided by the application of Pennsylvania law to the contract of the parties. Initially it might appear the issues presented are not sufficiently significant to warrant this Court's intervention.

However, the problem presented by this case is widespread. Are manufacturers and vendors to be permitted to ostensibly warrant against defects in their products but be exculpated from the damages they cause when they negligently fail to correct the defects which appear? The philosophy of many courts dealing with this question has been archaically restrictive in granting relief to purchasers of new defective products. If this Court accepts this petition and decides this case the stature of the Supreme Court is such that it would likely alter the orthodox,

restrictive interpretation of the alleged exculpatory warranties rendered by state courts.

It is not that other judges and legal writers have failed to see the evil in the present situation; it is that they have failed to take steps to correct that evil.

For the purpose of illustrating to the Court the applicability of the question to a myriad of consumers, this author, on August 7, 1970, purchased a Westinghouse coffee pot. Westinghouse extended a "Guarantee" remarkably similar to the one it extended to Southwest. The coffee pot "Guarantee" is also an exculpatory warranty, the pertinent parts of which state:

GUARANTEE

> This Westinghouse appliance is guaranteed . . . to be free from defects in workmanship and material. . . . Westinghouse will repair or replace, at its option, any parts which may fail under normal and proper use during the specified guarantee period; . . . Repair or replacement of any such defective parts shall constitute complete fulfillment of all of the obligations of Westinghouse with respect to the appliance.
> * * *
> The above guarantee is in lieu of all warranties, expressed or implied, including merchantability and fitness for purpose.
> * * *

If the wiring in that coffee pot proves defective and Westinghouse negligently attempts to repair but fails, causing it and the author's home to be destroyed by fire, the author will then be in substantially the same position as Southwest.

Untold numbers of warranties such as is involved in this case are extended each year by manufacturers of automobiles, appliances and like products. Although Southwest claims millions of dollars of damages arising out of the negligence of Westinghouse in performing its warranty, such a loss may well be miniscule compared to the cumulative losses of purchasers of new automobiles each year.

Simply put, petitioner seek an unequivocal pronouncement of

law directing manufacturers that they must, when it becomes apparent they have sold a defective product, properly and in a non-negligent, workmanlike manner, undertake to correct, and in fact correct, the defects in the product.

It is thus submitted that the significance of a decision by this Court on this subject would extend far beyond the mere interpretation of Pennsylvania law.

2. THE EXISTING PROBLEM.

The essence of the question presented is whether a warranty of the kind extended by Westinghouse is any warranty at all. A number of cases and law review authors have commented upon this problem.

A warranty similar to that issued by Westinghouse was judicially deplored by the Supreme Judicial Court of Massachusetts in *Hall v. Everett Motors, Inc.*, 340 Mass 430, 165 NE2d 107 (1960). In that case defective wiring in a motor vehicle was called to the attention of the seller. The seller failed to correct the defect and the automobile ultimately was destroyed by fire. The warranty, almost identical in terms to the one under consideration, was characterized by the Massachusetts Court as follows:

> "By the express language of the agreement all other warranties are excluded . . . (citing cases). *We are thus constrained to hold that there was no warranty whatsoever by the defendant dealer.*
>
> This is not the kind of an agreement which commends itself to the sense of justice of the court. It really means that the automobile is sold 'as is' subject to the honest satisfaction of the non-resident manufacturer that the defect was something for which it is liable. . . . We hope that should a similar case arise under the Uniform Commercial Code we shall not be so bound by precedent." (Emphasis added, 165 NE2d 109)

This judicial wringing of hands did not prove the springboard for a difference in philosophy. When the Massachusetts Court was presented with an opportunity under the Uniform Commercial Code to correct this deplorable law it avoided the issue, seizing

upon the inconspicuousness of the exculpatory language to invoke relief. See *Hunt v. Perkins Machinery Co.*, 352 Mass 535, 226 NE2d 228 (1967).

Nor did the language of that opinion deploring its own result cause other courts to adopt a different philosophy. The Supreme Court of North Dakota cited *Hall v. Everett Motors, Inc., supra,* and announced its unwillingness to change the law of North Dakota for the reason that it existed for "more than 42 years"! *Knecht v. Universal Motor Co.*, ND 113 NW2d 688 (1962).

The Supreme Court of Washington cited *Hall v. Everett Motors, Inc., supra,* and quoted that portion of the opinion which deplored the law of warranty and then apologetically applied the same rule. See *Noruay v. Root*, 58 Wash 2d 96, 361 P2d 162 (1961).

A case note in commenting upon such a warranty by Chrysler Motors, when it enlarged its warranty period from four months to one year, said at 36 *Notre Dame Lawyer* 233 (1961): ". . . under the old warranty the buyer received nothing. Under the new, he receives three times nothing."

Even an author advocating the right of the manufacturer to disclaim liability recognized the ineffectiveness of the Uniform Commercial Code in dealing with such disclaimers. Richard W. Duesenberg, *The Manufacturer's Last Stand: The Disclaimer*, Vol. 20, *The Business Lawyer*, 159 (1964), stated at page 163:

> "It is doubtful that the detailed Code provisions on disclaimers will have the effect of avoiding some of the sophistry often used in efforts to arrive at desired results. Drafting disclaimers has long been a tricky business, and will continue so."

In construing the obligation of Westinghouse in the instant case, the United States Court of Appeals for the Ninth Circuit said: "In undertaking the repairs, Westinghouse was merely fulfilling its contractual obligations." (Appendix p. xi) Aside from the fact that there was no evidence that Westinghouse did anything in "fulfilling its contractual obligations", the clear import

of this statement in the opinion is that as long as the manufacturer does something it has fulfilled its contractual obligation regardless whether its conduct is negligent or ineffectual to (in the terms of its own warranty) "correct any . . . defects."

In the words employed by one court, such a holding would permit Westinghouse to: ". . .indefinitely tinker with . . . [Southwest's] plant in the hope that it might ulimately produce the desired result." *A. Baldwin Sales Co. v. Mitchell,* 174 La 1098, 142 So 700, 702 (1932). See also *Allen v. Brown,* 181 Kan 301, 310 P2d 923, 928 (1957).

The Supreme Court of Kansas noted the problem in *Steele v. J. I. Case Company,* 197 Kan 554, 419 P2d 902, 908 (1966), as follows:

> "Of recent years, however, a good deal has been written by legal savants pointing out the iniquities which may result from a rigid enforcement of the disclaimer and limiting clauses which are so prevalent in commercial sales agreements. These scholars suggest that the efficacy of clauses of this character should be judged within the framework of modern business practices."

In one sentence the Westinghouse warranty expresses both what Westinghouse will do and that by so performing it has fulfilled all of its liabilities. Paring this sentence to the pertinent words, the warranty states:

> "Westinghouse . . . agrees to correct any . . . defects . . . and such correction shall constitute a fulfillment of all Westinghouse liabilities. . . ."

A number of courts in considering such exculpatory warranties have properly held that the vendor cannot take advantage of the exculpatory benefits when the vendor has not properly performed its agreement to repair.

An example is the refusal to give effect to the exculpation of consequential damages when the vendor was unsuccessful in accomplishing the repairs. See *Fairbanks-Morse & Co. v. Twin City Supply Co.,* 170 NC 315, 86 SE 1051 (1915); *Steele v. J. I. Case Company, supra; Westinghouse Electric & Mfg. Co. v. Glen-*

coe Cotton Mills, 106 SC 133, 90 SE 526 (1916); *Rose v. Chrysler Motors Corporation*, 212 Cal App2d 755, 28 Cal Rptr 185 (1963).

On other occasions exculpation of consequential damages has not been enforced when the warranty provided that after discovery of defects the vendor would either replace the equipment or return the purchase price and the vendor failed to do either. *Reitan v. Wilkinson*, 154 Okla 163, 7 P2d 486 (1932); *Minneapolis-Moline Power Implement Co. v. Wright*, 233 Mo App 409, 122 SW2d 397 (1938).

In *Minneapolis-Moline Power Implement Co. v. Wright*, *supra*, the Kansas City Court of Appeals described the situation in the following manner:

> ". . . plaintiff not only breached the contract in respect to the warranty of the machine but, as before stated, violated the provision of the contract providing the remedy in case of a breach of the warranty." (122 SW2d 401)

It is inconceivable that a failure to "correct . . . defects" by virtue of negligence in the attempt should be considered legally distinguishable from a failure to "correct . . . defects" by making no attempt at all. Surely no one would claim in the latter instance that the consumer would not have a remedy for consequential damages.

To fail to comply with a contract and at the same time rely upon the exculpatory language of the contract to avoid consequential damages, in the view of the Supreme Court of South Carolina, is to reproduce "the fable of the man who blew hot and cold." *Deiter v. Frick Co., Inc.*, 169 SC 480, 469 SE 297, 298 (1933).

3. SOLUTION.

There are many different methods of legal reasoning by which to provide at least a partial remedy to consumers under such a warranty if the judiciary would but resolve to accomplish this end. Six possible methods follow:

1. § 2-719 of the Uniform Commercial Code (adopted by Pennsylvania and found by the United States District Court as being controlling, Appendix pp. xxvi-xxvii) permits a vendor to limit "the measure of damages recoverable". The Code specifically states that one of the possible limitations of remedies can be to limit the vendor's obligation "to repair and replacement of non-conforming goods or parts". But such right of limitation is qualified by the Code as follows:

> "(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act. (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable."

A fair interpretation of subsection (2) ought to be that when a vendor has agreed to correct defects it must do so in a workmanlike manner or else the remedy fails "of its essential purpose".

Likewise, it would seem only reasonable that when under its warranty the vendor expressly agrees to "correct . . . defect" an exculpation of any damages negligently caused by an ineffectual attempt is unconscionable.

By negating the exculpatory language, the buyer then would recover damages as provided by Uniform Commercial Code § 2-714.

2. A second method of reasoning would be to interpret the contract in the light of Comment No. 1 to Uniform Commercial Code § 2-313. This section describes the creation of express warranties. (Surely the warranty of Westinghouse must be interpreted as an express warranty that the product is free of "any defect or defects in workmanship or materials".)

Comment No. 1 to Uniform Commercial Code § 2-313 of the official comments by the Conference of Commissioners on Uniform State Laws and the American Law Institute states in part:

> "1. 'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain

that words of disclaimer in a form are repugnant to the basic dickered terms."

Although by the terms of the agreement, we are not dealing with a disclaimer of warranties, the total exculpation of responsibility as claimed by Westinghouse is so broad that it should be construed as a disclaimer, ignoring the form of the words, and looking to the substance. The conclusion would be to hold that such a total exculpation of liability is repugnant to the express warranty.

3. Another alternative method which could be selected by the courts was suggested by Thomas A. Wooterers.[1] He said:

> "A court wishing to provide a remedy could extend the scope of express warranties, particularly the warranty of description, far beyond their normal connotation. Assume a contract for the sale of a pump containing an effective disclaimer of all other warranties. The pump is delivered without a piston and, as a result of its failure to operate, the buyer suffers severe and extensive water damage. Could not a court wishing to provide a remedy say that a pump differing so substantially from the object contemplated by the contract is not a pump, but a very different thing; and that the seller has therefore breached his warranty of description?"[2]

4. Another method of reasoning which the judiciary could employ to protect consumers, if it were so inclined, is to simply adopt the old tried and true rule of interpretation of contracts and rule that such a limitation is to be construed against its author. *Dilks v. Flohr Chevrolet, Inc.*, 411 Pa 425, 192 A2d 682 (1963). In this manner, the court could insist that if a vendor intends it can negligently perform its contract to repair without liability, it should specifically so provide. In the absence of such a specific

[1] *Warranty Disclaimers and Limitation of Remedy for Breach of Warranty under the Uniform Commercial Code*, 15 *Boston University Law Review* 396, 401.

[2] Such a warranty exists under the Uniform Commercial Code § 2-313 (1)(b). Comment numbers 4 and 5 to this section of the official comments by the Conference of Commissioners on Uniform State Laws and the American Law Institute, make it clear that such a warranty probably cannot be altered, else the vendor would only have a "pseudo-obligation."

provision, the exculpation for negligent repairs would be read out of the contract.

5. Or the court could go further and hold that exculpation of damages for negligent performance of a duty to correct defects is absurdly inconsistent with the warranty against the existence of defects. *Fairbanks-Morse & Co. v. Twin City Supply Co.*, *supra*, at 1054.

6. One further method by which the courts could protect consumers, if they chose to do so, is to apply the well established rule that one who undertakes to perform a duty is obligated to perform that duty in a non-negligent manner (*Restatement of Torts 2d*, § 323) and that such duty arises when the vendor attempts to repair pursuant to the contract.

These suggestions do not in any way enumerate all possible methods of providing a remedy for the injustice produced by such an exculpatory warranty followed by negligence in correcting defects. Many others are available. The important point is that regardless of the legal rationale, the infliction of such a result upon consumers as obtains in this case ought not be permitted.

The result sought by petitioner is not without judicial precedent, as pointed out above. What is hoped is that this Court will, in granting the relief petitioner seeks, point the way for all state courts to dispense justice to consumers, aggrieved in the manner Southwest is aggrieved.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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August 10, 1970.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWEST FOREST INDUSTRIES, INC.,
Appellant,

vs.

WESTINGHOUSE ELECTRIC CORP.,
Appellee.

No. 22,696

[February 9, 1970]

Appeal from the United States District Court
for the District of Arizona

Before: DUNIWAY and HUFSTEDLER, Circuit Judges,
and PENCE,* District Judge

DUNIWAY, Circuit Judge:

In 1963 Southwest Forest Industries, Inc. [Southwest] brought suit against Westinghouse Electric Corp. [Westinghouse] for damages resulting from defects in a 25,000 kilowatt turbine generator sold by Westinghouse to Southwest.[1] Jurisdiction in the district court rested on diversity of citizenship. Southwest appeals from the district court's judgment for Westinghouse. We affirm.

After preliminary feasibility studies, Southwest and Rust Engineering Company [Rust] entered into an agreement under which Rust was to construct a pulp and paper mill for Southwest near Snowflake, Arizona. Pursuant to this agreement, Rust

*Honorable Martin Pence, United States District Judge, District of Hawaii, sitting by designation.

[1]The original claim was for $11,000,000. By the time of trial it had been reduced to approximately $2,500,000. An antitrust count in the original complaint was severed.

initiated negotiations with Westinghouse for the purchase of the generator in 1960. There followed a warranty battle, the outcome of which is disputed by the parties. Westinghouse built the unit and it was installed in the Southwest plant in late 1961. The bulk of the damages claimed by Southwest are for "lost time, labor, materials, and loss of business" suffered as the result of subsequent slowdowns and shutdowns in Southwest's Snowflake plant in late 1961 and 1962, allegedly caused by defects in the Westinghouse generator.

1: *The proceedings in the trial court.*

The parties are in sharp disagreement about how to characterize the proceedings in the trial court, and many of their arguments on appeal rely on one or another interpretation of those proceedings. We therefore resolve that issue at the outset. The best way to arrive at an understanding of what happened in the trial court is to review briefly the history of the litigation in this case.

Southwest's original complaint claimed negligence and breach of warranty. In response to a Westinghouse interrogatory asking for "a copy of the document or documents which plaintiff considers to contain the terms of the warranty in question," Southwest in 1964 submitted correspondence containing the Westinghouse form of warranty.[2] From that date until the eve of trial in 1967, discovery and trial preparation proceeded on the theory that the Westinghouse warranty controlled. In 1966 Southwest twice amended its complaint, once to add a count alleging mal-

[2] "Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages. . . .

"On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form."

function of an "exciter" unit in 1964, once to add a count in strict liability in tort. Shortly before trial Westinghouse filed two motions for partial summary judgment: one was on the strict liability count, contending that the rationale of the doctrine was inapplicable to the situation in this case; the other urged that the Westinghouse warranty barred recovery of consequential damages and that all the damages claimed were concededly consequential. At the following pretrial conference, Southwest voluntarily abandoned its warranty count and the court granted Westinghouse's motion for summary judgment on the strict liability count. This left only the negligence claims relating to the basic unit and the "exciter" unit. Then, literally on the eve of trial, Southwest filed a motion to amend its complaint to reallege the warranty theory, and to amend its 1964 answers to the Westinghouse interrogatories asking which documents contained the warranty. Southwest now wished to take the position that its own much broader warranty applied.[3] The trial court granted the motion and continued the trial for several days to allow for additional discovery. Westinghouse then renewed its motion for summary judgment on the warranty count. In denying that motion, the district court said:

> "I think, gentlemen, by the vehemence of your own argument, what you are both trying to do is argue from your version of the testimony in the various depositions and interpreting from there to the exhibits and asking the court

[3] "(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the material furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder. . . .

"(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern."

to evaluate in many instances the testimony of the persons being deposed, which I don't think is the function of a court in a motion like this."

Trial to a jury began the following day.[1] At trial, Southwest's file on the purchase of the generator was produced for the first time. (Southwest had previously said that the file was lost or destroyed.) This file suggested that Southwest's own executives had assumed throughout the relevant period that the Westinghouse warranty was in effect.

It was at this juncture that Westinghouse renewed its motion for "partial summary judgment," a procedure to which Southwest's trial counsel agreed:

"Mr. Perry [counsel for Southwest]: If the court please, Mr. Flynn has indicated that he desires to renew his motion for summary judgment at this time, and on behalf of the plaintiff, I have agreed that it is appropriate that it be done at this time since I believe that the issues he raises are legal ones and that there is sufficient uncontradicted evidence in the record from which a determination of those legal issues can be made.

[1] After the opening statements at trial, the court, apparently under the impression that the defendant was speaking about summary disposition of the warranty question, said:

"THE COURT: Well, it's my understanding Mr. Flynn [counsel for the defendant], that one of the big issues in this case as it is now developed is, just what is the contract, and I don't think that the court can determine that in a vacuum.

I am reluctant to force competent counsel to try to stipulate or agree to anything that they don't want to agree to, and to give them an opportunity to have it tried; but with the state of issues in this case and the pleadings as they are now, if you two could agree upon a chain of documents, then perhaps the court could decide as a matter of law with those facts in mind just when the contract was entered into in this series of correspondence, and, having determined that, then as to what the terms of it were. But I think that some of the things that you are asking the court to decide are some of the things that are actually factual issues before they become legal issues, if I understand what you are saying, and in that case it is more appropriate, I think, to take the facts and then handle it with instructions to the jury that this is what the contract was as a matter of law and this is what it provides as a matter of law, and then if you find thus and so, and go ahead."

Counsel has raised the point in two separate motions for summary judgment that consequential damages cannot be recovered in this action, in an action based upon negligence, for the reason that he takes the position that consequential damages are never recoverable in a negligence action; and for the second reason that he believes the warranty clause, which is the effective clause in this case, has the effect of barring a right to recover in tort. We, of course, resist both of those positions.

In addition, there is a dispute which we believe is a legal one about which if any warranty provision is effective to control the contractual relationship between the parties, the contention of Westinghouse, the defendant, being that the disclaimer of limitation of warranty in their documents that are before your Honor is effective and limits any right of recovery on the part of the plaintiff.

The position of Southwest Forest Industries as plaintiff is that the warranty is as broad as the language contained on the back of the purchase orders issued on behalf of Southwest Forest Industries, and that language is broad enough to permit recovery of the damages we seek in this action. The damages we seek being so called consequential damages, and more specifically being damages for overhead expenses incurred while the mill was not operating as it would have, but for the turbine generator problems and the exciter problems.

Have I stated the issues fairly?

Mr. Flynn [counsel for Westinghouse]: I think that's true . . . ."

The parties supplemented the record by stipulating to those additional documents and depositions which they wished the court to consider.

The argument of both counsel was devoted to drawing inferences from the evidence before the court. In granting the Westinghouse motion for "partial summary judgment," the court said:

"THE COURT: Well, I feel rather reluctant to determine in a summary manner as we have here a matter of this magnitude, but after going through all of the documents and the depositions last night and hearing counsel's [sic] argument

today, I can only conclude that both of their actions prior to installation and start-up of the turbine and by the actions of Southwest subsequent to that, that at all times in the negotiations and in the contracts all of the parties were going on the assumption that the warranty in the original Rust-Southwest inquiry, an invitational letter, and as modified to some extent by the proposal and later order acknowledgement of Westinghouse, was the contract warranty regardless of at what stage along the line of poceedings a final contract was entered into. I don't think that the conduct of the parties during the entire time can be reasonably or logically explained on any other assumption."

The warranty referred to by the trial court is what we have described as the Westinghouse warranty. The court also determined as a matter of law that the language in the warranty was successful in relieving Westinghouse of all liability for consequential damages, including any liability on a straight tort theory. The jury was then dismissed and the proceedings closed. The court later entered a formal order and an opinion.

At this point, Southwest changed counsel and filed a motion to alter or amend the judgment. Southwest's memorandum in support of that motion made many of the arguments now pressed here on appeal. In denying the motion, the trial judge made the following remarks:

". . . I think it's really, in the court's mind at least, immaterial whether you characterize the proceeding as a request for an interlocutory summary adjudication on a point in this case as to what constituted the warranty or whether it was a waiver of a jury finding. . . .

The only thing that bothers the court and has bothered me all the time is whether or not a summary judgment under these circumstances was proper for just the considerations that Mr. O'Connor [Southwest's new counsel] has raised. . . ."

On appeal the parties persist in their disagreement over the nature of the trial court proceedings. The issue was extensively briefed, Southwest maintaining that the district court disposition was an improper summary judgment since there were issues of

material fact, Westinghouse claiming that the district court proceedings were actually a trial to the judge, by agreement of the parties, on a limited record supplemented by stipulations.

Whatever Southwest's current counsel's current position may be, we think the record shows that the trial court, with the consent of both parties, decided all the issues raised by the final amended complaint, including the negligence in manufacture and repair issues. The parties stipulated to what was in substance a trial to the court on a limited record. The district judge was well aware that issues of fact existed, as his denial of the motion for summary judgment before trial and his remarks quoted in footnote 4 show. It was reasonable for Southwest's trial counsel to agree to this procedure in order to avoid a long jury trial under theories that the court might ultimately reject. If Southwest could not recover consequential damages for negligence, and the damages were concededly consequential, then there was no point in trying the negligence issues. Southwest's acquiescence in the procedure amounted to a waiver of jury trial in the event all the issues before the court should be decided favorably to Westinghouse. They were so decided, and we therefore treat the district court's decision on appeal as a decision on the merits following trial.

We were presented with a similar record in *Gillespie v. Norris*, 9 Cir., 1956, 231 F.2d 881. In *Gillespie*, where the validity of a patent was at issue, the trial court had also rendered a "summary judgment." Though we dismissed the appeal as premature because a counterclaim had not been adjudicated, we said:

> "This Court holds that, by acquiescence in this procedure, the parties waived jury trial and submitted all questions of fact relating to novelty, utility, invention and anticipation to the court for determination. It already has been shown that there were questions of fact upon which the parties were at issue. Now, while summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned, there is no reason why parties cannot agree to try

a case upon affidavits, admissions and agreed documents. In effect, that is what was done here. No objection whatever was made at the time of submission that there were questions of fact which could not be decided upon the evidence before the trial court. Such a postulation was never suggested to the trial judge. It was only upon appeal that this spectre is raised for the first time."

See also *Page v. Work*, 9 Cir., 1961, 290 F.2d 323, *modified on rehearing* 290 F.2d 334, *cert. denied* 1961, 368 U.S. 875; *Tripp v. May*, 7 Cir., 1951, 189 F.2d 198.

2. *The merits.*

Proceeding to the merits, there are several issues properly before this court on appeal.

a. *Was there a meeting of the minds?*

First, Southwest argues that there was never a meeting of the minds on the Westinghouse form of warranty as required by the Uniform Commercial Code, §§ 2-204, 2-207(3) as interpreted by the Pennsylvania courts. In light of the nature of the decision below, this must be taken as an argument that the district court's decision was clearly erroneous or unsupported by the evidence.[5] That position cannot be maintained on this record, and thus we need not go into Southwest's argument that code warranties apply in the absence of agreement on an express warranty or that Southwest's own warranty applies. We leave the "battle of the warranties" problem to another day.

[5]The district court said:

"At all times in the negotiations and in the contract documents, and in the complaint itself, which alleges June 6, 1960, as the contract date, all of the parties operated on the assumption that the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse order acknowledgement form, constituted the contract for the sale of the turbine generator unit. The conduct of the parties during the entire time and up to the filing on August 2, 1967, of plaintiff's Amendment of Complaint — July 29, 1967, cannot reasonably be explained on any other basis. By every objective test there was an agreement as to the nature of the contract in effect and its terms and conditions and particularly as to the express warranty involved." (Footnotes omitted.)

b. *Was the limiting language of the warranty unconscionable?*

Southwest argues that the limitation of consequential damages was unconscionable, and that the limitation was not brought to the attention of Southwest. As to the latter assertion, the district court expressly found that:

> "[t]here were experienced purchasing departments, staffs of engineers, and legal departments available to all three companies. Rust has had great experience in purchasing electrical equipment from Westinghouse. . . .
>
> All purchasing departments involved were familiar with the Westinghouse order and acknowledgement forms:"

The unconscionability argument runs as follows: under the warranty Southwest's sole remedy was repair or replacement of defective parts; Westinghouse made the repairs negligently and Southwest was thus left without any remedy at all; this makes the exculpatory clause unconscionable and therefore invalid under UCC sections 2-719(2) and 2-302.

The problem with this argument is that it was not raised properly below. As the district court noted in is opinion, "there is no evidence before the court that Westinghouse failed to perform its obligations under its warranty . . . there are no allegations of unconscionability." In rejecting the argument when it denied Southwest's motion to alter or amend, the district judge said:

> "I do not think that the question of unconscionability was ever seriously raised by counsel. No offer was ever made to make any record supporting it, and I think in the context of this case these facts and these parties, the court could not say that there was a question of unconscionability upon which evidence should be taken particularly in the absence of any offer or claim by counsel to that effect."

We agree. Certainly the district judge's refusal to entertain the argument on the post-judgment motion was not an abuse of discretion.

c. *Was there liability for negligence?*

Southwest's argument concerning liability for negligence must

take the following form in light of our characterization of the proceedings below;: The district court erred in its conclusion that the Westinghouse warranty was adequate as a matter of law to relieve Westinghouse from liability for (1) negligent breach of warranty and (2) negligence on a pure tort theory: therefore Southwest was entitled to a jury trial on the issue of negligence.

As to the first, Pennsylvania law applies.[6] The district court was correct in holding that "[l]imitations of liability under Pennsylvania law are valid and enforceable. The parties to an agreement may contract as to limitation of liability resulting from breach of both expressed and implied warranties." Such a limitation may also preclude recovery for losses resulting from negligence. See *Mayo v. McCloskey & Co.*, E.D.Pa. 1961, 200 F.Supp. 7; *Shafer v. Reo Motors, Inc.*; W.D.Pa. 1952 ,108 F.Supp.659; *Charles Lachman Co. v. Hercules Powder Co.*, E.D.Pa. 1948, 79 F.Supp. 206; *Eimco Corp. v. Joseph Lombardi & Sons*, 193 Pa. Super. 1, 162 A.2d 263 (1960); *Magar v. Lifetime, Inc.*, 187 Pa. Super. 143, 144 A.2d 747 (1958). See generally *National Steel Corp. v. L. G. Wasson Coal Mining Corp.*, 7 Cir., 1964, 338 F.2d 565; *Fire Ass'n v. Allis Chalmers Mfg. Co.*, N.D. Iowa 1955, 129 F.Supp. 335.

Second, Southwest argues that Westinghouse cannot limit its liability on a pure tort negligence theory under *Arizona* law. Southwest may have waived this argument. Its trial counsel repeatedly asserted that Southwest was proceeding only on a contract theory. Southwest did not argue for liability under Arizona tort law until after the trial court judgment, though the district court did state that "[u]nder these facts there also can be no recovery for consequential damages based upon a theory of negligence, apart from a contractual duty." The most persuasive argument for waiver is that it seems clear that both parties assumed until after the change in counsel that a decision for Westinghouse on the warranty issues

[6]All purchase negotiations and documents material to this transaction were executed in Pennsylvania. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 1941, 313 U.S. 487; *Ross v. Ross*, 96 Ariz. 249, 393 P.2d 933 (1964).

would conclude the trial. There is no indication that either party expected the court to make a finding on negligence. The court dismissed the jury without protest from Southwest's trial counsel after its decision.

The general rule is to permit contracts limiting tort liability when they have been bargained betweeen large corporate enterprises as here. While it is true that the Arizona Supreme Court has said, "[r]elief from negligence cannot be contracted away," this was in an F.E.L.A. action against a common carrier. *Apache Ry. Co. v. Shumway*, 62 Ariz. 359, 158 P.2d 142 (1945). Thus the district court was correct in finding that the Westinghouse warranty succeeded in limiting Westinghouse's liability for consequential damages resulting from negligence. See generally *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17, (1965); 2 F. Harper & F. James, The Law of Torts §§ 28.1-28.14, 28.25 (1956); W. Prosser, Torts § 67, at 456-59 (3d ed. 1964); Restatement (Second) of Torts, §§ 388-404 (1965); James, Assumption of the Risk, 61 Yale L.J. 141, 162-66 (1952). See also the state and federal Pennsylvania cases cited *supra*.

As the district court notes, Southwest's best argument seems to be on the negligent repair issue. One who undertakes repairs has a duty arising in tort to do them without negligence. The district court did not decide that there had been no negligence in repair. Because the court was explicit, it cannot be presumed that it decided all the factual issues before it, if indeed this issue was before it. But the district court was correct in holding that the warranty precluded recovery for consequential damages resulting from negligence in repair. In undertaking the repairs, Westinghouse was merely fulfilling its contractual obligations. There was no assertion, as the district court pointed out, that Westinghouse had not fulfilled those obligations. And the warranty is clear both that repair and replacement are all that Westinghouse may be held responsible for and that Westinghouse may not be held liable for consequential damages.

Southwest further claims that the district court erred in characterizing the damages claimed by Southwest as consequential. This argument was raised for the first time after judgment; Southwest's trial counsel had characterizeed the damages as consequential throughout. In any event the warranty also provided that repair and replacement of nonconforming parts should "constitute a fulfillment of all Westinghouse liabilities," which is adequate to limit Southwest's liability under UCC § 2-719 (1)(a). This section also meets Southwest's argument that the warranty is an unsuccessful disclaimer of liability under UCC § 2-316.

Finally, Southwest argues that Westinghouse should have been held liable on a theory of strict liability in tort. The district court was correct when it granted Westinghouse's pretrial motion for summary judgment on this count. As the district court said:

> "the principles underlying the doctrine of strict liability in in tort for defective products were not applicable. All damages sought by Southwest in this case are consequential damages. The turbine generator is a highly specialized, custom-built piece of machinery, built to particular specifications and tested in the factory before delivery, under supervision of engineers representing both parties.
>
> The circumstances of this case do not bring the plaintiff within that class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved support an extension of the doctrine of strict liability in tort to the present facts." (Footnotes omitted.)

See generally *Seely v. White Motors Co., supra;* 2 F. Harper & F. James, The Law of Torts §§ 28.15-28.28 (1956); Prosser, The Fall of the Citadel—Strict Liability to the Consumer, 50 Minn.L.Rev. 791, 822-23 (1966).

In summary, the district court's decision cannot be overturned as an improper summary judgement, since it actually amounted

to a decision on the merits after the parties stipulated to a trial to the court on a limited record. The other points made by appellant are either without merit or were raised belatedly after the district court judgment. It cannot be said that the district judge abused his discretion in denying Southwest's new counsel's motion to alter or amend.

Affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWEST FOREST INDUSTRIES, INC., Appellant, vs. WESTINGHOUSE ELECTRIC CORP., Appellee.	No. 22696 DC# 860-Pct.

FILED June 10, 1970. W. J. Furstenau, Clerk, United States District Court for the District of Arizona. By S. Easterday, Deputy Clerk.

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellant.

Costs:

Brief of appellee:	$689.75;
Repro. record:	76.55
Total	$766.30

A TRUE COPY: ATTEST: Jun - 2 1970. Wm. B. Luck, Clerk. By s/ William E. Wilson. William E. Wilson, Chief Deputy.

Filed and entered Feb. 9, 1970.

Filed Sep 8 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,

Plaintiff.

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,

Defendant.

ORDER AND JUDGMENT
(Partial Summary Judgment)

Trial to a jury was commenced in this matter on August 8, 1967. The original complaint was filed December 17, 1963. Issue was joined on plaintiff's amended complaint filed July 21, 1967, together with plaintiff's "Amendment of Complaint—July 29, 1967" filed August 2, 1967, and defendant's "Amended Answer and Counterclaim to Plaintiff's Amended Complaint filed August 7 (sic), 1967." There had been various other amendments and changes made in plaintiff's complaint in the interim. Count One and the Supplemental Complaint set forth in the final pleadings sounds in negligence; Count Two, a "strict liability in tort" theory; and Count Four, a warranty theory; all contain, however, prayers for consequential damages only.

Prior to time of trial, Count Three of the final complaint (antitrust) had been severed for a later and separate trial and a stipulation entered into by the parties and filed which is dispositive of defendant's counterclaim. Prior to trial the Court had

granted defendant's Motion for Summary Judgment as to Count Two of the complaint (products liability theory). Count Four of plaintiff's complaint (Amendment of Complaint—July 29, 1967) restated a warranty theory which had previously been withdrawn by plaintiff.

On August 10, 1967, the third day of trial, with the consent of counsel for plaintiff, defendant renewed its motion for partial summary judgment as to all counts except the severed antitrust count. The question raised by the motion being:

First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?

Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?

Counsel for both sides agreed that these were questions of law to be decided by the Court from the trial record to that time together with certain stipulated exhibits and depositions. Counsel also agreed that as to these issues and the agreed record there was no dispute as to any material issue of fact and no additional evidence bearing on these two legal questions available to either party.

The Court, having considered the stipulated evidence and read and heard the memoranda and arguments of counsel in support of and in opposition to defendant's said motion for partial summary judgment, has determined that the applicable warranty upon which the sale of machinery was based and which establishes and limits the liability of the defendant and upon which there had been and was a "meeting of the minds" at all pertinent times, is that referred to in Exhibit C-2 attached to plaintiff's answers to defendant's written interrogatories (filed by plaintiff on August 17, 1964) reading as follows:

"WARRANTY Westinghouse, in connection with apparatus sold

hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part of parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

The Court has further determined as a matter of law that defendant, by virtue of the limitations in this warranty, is not liable to plaintiff for the claimed consequential damages under any theory set forth in those portions of the final pleadings subject to the motion for partial summary judgment. There was no evidence before the Court that defendant had failed to perform its affirmative warranty duties of correction and replacement.

The Court announced from the bench on August 11, 1967, its decision to grant the motion for partial summary judgment.

Now, Therefore, It Is Ordered that defendant's motion for partial summary judgment as to all portions of plaintiff's complaint other than Count Three (antitrust) be granted. Because defendant's costs incurred to date are not fairly separable as being applicable to these counts alone and not to Count Three, taxation of costs will made in connection with the ultimate final determination of the case.

The Court hereby expressly determines that there is no just reason for delay and expressly directs the entry of final judgment herein in accordance with the foregoing, notwithstanding the fact that there remain other claims that have not been disposed of by this order and judgment.

On July 21, 1967, plaintiff and defendant filed their Pretrial Statement containing a stipulation (paragraph numbered 5) regarding defendant's counterclaim and providing that ". . . in the event plaintiff does not recover on its complaint, defendant is entitled to judgment on its counterclaim . . ." Until the entire

complaint has been adjudicated, the Court does not feel it appropriate to enter final judgment on the counterclaim.

For benefit of counsel, the Court is concurrently filing a detailed opinion upon which this Order and Judgment is based.

Dated this 7th day of September, 1967.

/s/ WM. P. COPPLE
Wm. P. Copple
United States District Judge

Filed Sep 8 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC., a corporation,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation,

Defendant.

OPINION

Southwest Forest Industries, Inc., a Nevada corporation (hereafter Southwest), which owns and operates a pulp and paper mill near Snowflake, Arizona, sued Westinghouse Electric Corporation, a Pennsylvania corporation (hereafter Westinghouse), claiming damages by reason of lost time, labor, materials, and loss of business as the result of the alleged (1) negligent manufacture of the turbine generator unit supplied to the Snowflake mill by Westinghouse, (2) negligent repair of the unit when defects caused by Westinghouse negligence in the manufacture of the equipment were discovered, and (3) negligent or other breach of warranty because the equipment supplied was inadequate and unsuited for use in plaintiff's business in that it failed to provide electric energy at the times and in the quantities required for the operation of the mill.[1] A supplemental complaint alleged negligence in the manufacture of an exciter unit, a part of the turbine

[1]The negligence allegations were further refined, in a joint pretrial statement, as follows:

generator unit, that was not discovered until after the original complaint had been filed. An additional amending count alleged that the turbine generator unit was defective in design, materials, manufacture and assembly, to "take advantage of the newly recognized doctrine of strict liability in tort'." The facts upon which the allegations of strict liability in tort and the resulting damages are based are the same as those alleged in support of the negligence and breach of warranty counts.[2]

"Plaintiff contends defendant was negligent in one or more of the following particulars:

"A. In the manufacture of the turbine generator unit by reason of leaving foreign materials in the control system of the unit.

"B. In the supervision of the installation of the control system of the unit at Snowflake, Arizona, by utilizing inadequate flushing procedures.

"C. In the repair of the control system after foreign materials were first discovered.

"D. In the design of a filtration system for the control system."

The factual basis of the breach of warranty claim was stated by the plaintiff to be the same as that of the negligence claim. In addition, Westinghouse counterclaimed for $57,082.20, the balance due on the purchase price of the turbine generator unit. The joint pretrial statement agreed that this amount was the unpaid balance, that in the event Southwest did not recover on its complaint Westinghouse was entitled to judgment on its counterclaim in that amount plus interest at 6% per annum from December 15, 1961, until paid, and that in the event Southwest obtained a judgment against Westinghouse, Westinghouse was entitled to an offset of $57,082.20.

[2]Exhibits submitted by Southwest provide "the total dollar value of consequential damages claimed, together with mathematical computations supporting such claim." These include recovery of fixed operating costs for the period of delay in startup of the mill caused by difficulties with the turbine generator unit, the cost of repairs made by Rust Engineering Company to the turbine generator unit, and additional caustic (used in the papermaking process) purchased to offset that lost from the recovery boiler as a result of shutdown of the turbine, together with recovery of fixed operating costs and the cost of repairs relating to the exciter unit. No damages are claimed resulting from personal injuries or physical harm to property.

The damages sought resulting from the alleged improper manufacture, installation, and repair of the turbine generator unit were suffered between December 1961 and April 1962. Those resulting from the alleged improper amnufacturer of the exciter unit were suffered in July 1964.

After the trial of this matter had commenced, and testimony and exhibits had been received in evidence, Westinghouse renewed certain motions for partial summary judgment. Southwest agreed to this procedure and that there were no issues of material fact with respect to the matters before the Court for decision.[3] The determination of these motions turns upon the terms and legal effect of various agreements entered into by the parties for the sale, erection, and installation of the turbine generator unit, together with a consideration of the policies supporting the doctrine of strict liability in tort. There follows a summary of the facts necessary for this determination.

Upon the completion of certain preliminary feasibility studies, Southwest[4] and Rust Engineering Company (hereafter Rust) entered into a formal agreement under which Rust was to construct the Southwest pulp and paper mill to be located near Snowflake, Arizona.[5] The total design, construction, purchase,

[3]The parties also agreed that the Court might consider certain documents that had either been admitted into evidence at the trial or were attached as exhibits to designated depositions, that there existed no dispute as to any material facts necessary to decide the legal issues of what documents constituted the contract and whether Westinghouse was liable thereunder for the claimed consequential damages, that the specified exhibits were genuine in that they were what they purport to be, that the only question at this stage of the proceedings was the legal significance of the testimony and exhibits, in connection with the motion for summary judgment, and that neither side had any evidence to present contradicting or impeaching any of the testimony in the specified depositions.

[4]Southwest was incorporated as a Nevada corporation on September 30, 1935. The Snowflake mill is one of several operating divisions of the company, others of which include logging operations and lumber mills. The consolidated balance sheet for the Snowflake division alone shows its assets to be in excess of $37,000,000 for the year 1962. The Snowflake mill employed 426 persons as of July 1964.

[5]Article 1, paragraph C(10) of this agreement provided that Rust would "conduct its purchasing program and work in connection with the Project so as to obtain benefit from manufacturer's warranties with respect to, and guarantees of the performance of, machinery, equipment and other apparatus and facilities to be a part of the Project and to pass to Southwest, as soon as possible, all such manufacturer's warranties and guarantees."

and installation of the mill and its equipment were to be accomplished by Rust, as was the final decision as to what equipment was to be purchased for the mill.

Pursuant to these agreements, Rust sent to Westinghouse on May 30, 1960, an invitation to bid on the turbine generator unit. While not a part of the contract between the parties, the invitation is significant in determining Rust's expectations.[6] Westinghouse then sent to Rust, on May 18, 1960, a formal proposal containing detailed specifications for the turbine generator unit. The first page of the proposal's covering letter stated that the proposal was "subject to the terms and conditions on the back of this quotation."[7]

Supplementing the contract between Rust and Southwest was a separate agreement appointing a Rust purchasing officer as the purchasing agent to act on behalf of Southwest.

[6]Paragraph 13 of the invitation included, with other requirements to be furnished with the proposal, the following:

> "GUARANTEE: Supplier shall be required to guarantee the performance of his equipment and the material furnished to the extent that he shall replace, f.o.b. job site, without additional cost to the owner, any unsuited to the purpose intended during the first year of use of same in active service, upon notice by the engineers or owner."

This guarantee was not a part of a standard request for quotations used by Rust, but was specially drafted for this particular Southwest order.

[7]These terms and conditions included the following:

> "Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year, from the date of shipment, by repair or replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages. . . .
>
> "On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form."

In addition, the formal proposal itself, at page 5B, contained the following warranty with respect to installation and services:

On June 6, 1960, the Rust purchasing officer designated as Southwest's agent sent to Westinghouse a letter of intent,[8] upon which Rust expected Westinghouse to begin to prepare engineering drawings, start the work under the contract, and expend funds in its furtherance. Westinghouse next sent to Rust, on June 13, 1960, a form of acknowledgment,[9] which was eventually sent on to Southwest by Rust.

On July 6, 1960, the formal purchase order referred to in the Rust letter of intent of June 6, 1960, was sent to Westinghouse on a Southwest purchase order form.[10] This purchase order was

"Westinghouse warrants that the recommendations of the Field Engineer shall accurately reflect the best judgment of a qualified engineer in the premises, but no other warranty or obligation of any kind shall extend thereto or be implied therefrom and Westinghouse shall not be liable for any act or omission of those not its employes nor for any injury, loss, damage, delay, failure to operate, or other things whatsoever due in whole or in part to any cause other than failure of its engineering recommendations to fulfill such warranty. The liability of Westinghouse with respect to the Field Engineer's services shall not, in any event, exceed the cost of correcting defects in the apparatus, and Westinghouse shall not be liable for consequential damages."

[8]The letter of intent stated:

"It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit, generally in accordance with your above referenced proposal.

"However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand had been established for approximately 13½ months."

[9]The face of the customer's copy of the acknowledgment form states: "See reverse side for terms and conditions." On the reverse side is a warranty identical to the warranty appearing as a part of the Westinghouse proposal.

[10]The warranty contained in the Southwest purchase order form provided:

"(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and

received by Westinghouse, which, after determining the shipping date of the turbine generator unit, stamped on the face of the purchase order (and each of the subsequent purchase orders received thereafter) a conditional acceptance[11] and returned it to Rust.

Revised copies of the Southwest purchase orders were sent by Rust to Westinghouse in October, 1960. These revisions removed from the original contract between Westinghouse and Southwest the erection and installation of the turbine generator unit, substituting an independent contract between Rust and Westinghouse for such services. The new erection and installation contract accepted page 5B of the original Westinghouse proposal, which contained a warranty substantially identical to the original Rust

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the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder. . . .

"(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern."

[11]The following Westinghouse stamp appears on the first page of each Southwest purchase order form:

"Order *PG88081.*

"In referring to this order please use this number as a reference.

"Order accepted subject to conditions outlined in attached WE Corp form of acknowledgement."

The longhand notation, "will ship W/O [week of] 7/10/61. J. J. Rice 8/9/60," appears on the face of the first purchase order form. The word "attached" was lined out because the Westinghouse form of acknowledgement had previously been sent to Rust. See notes 7 and 9 *supra* for the Westinghouse form of acknowledgement.

Each Southwest purchase order form provided a space for signature and acknowledgement that "The foregoing order is hereby accepted by the Vendor subject to all terms and conditions set forth herein." On none of the Southwest purchase order forms was the space for acknowledgment signed.

request for warranty and the warranty contained in the Westinghouse proposal.[12]

On July 24, 1967, some days prior to trial, the Court granted defendant's motion for partial summary judgment as to the damages claimed under the theory of strict liability in tort because the principles underlying the doctrine of strict liability in tort for defective products[13] were not applicable. All damages sought by Southwest in this case are consequential damages.[14] The turbine

[12]See note 7, *supra*. Other facts before the Court show that Rust was requested by Southwest in August or September, 1962, to extend the Westinghouse warranty. Rust and Westinghouse exchanged correspondence, the effect of which was that the replacement portion of the warranty would be extended, but that no blanket extension of the warranty could be made. A Southwest memorandum dated April 9, 1962, refers to documents that Southwest's attorney would like to have in preparing an insurance claim for the damages suffered at the mill. This memorandum refers specifically to the form of warranty contained in the Westinghouse order acknowledgment form that had by that time been received by Southwest.

To the Court these facts also show at these late dates that Southwest clearly confirmed their understanding that it was the Westinghouse form of warranty, limited in time and obligation, that was applicable to the sale.

[13]See, *e.g.*, *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Price v. Gatlin*, 241 Ore. 315, 405 P.2d 502 (1965); *Brewer v. Reliable Automotive Co.*, 240 Cal. App.2d 228, 49 Cal. Rptr. 498 (1966). *See generally* Restatement (Second) Torts § 402(A); Prosser, *The Fall of The Citadel —Strict Liability to the Consumer*, 50 Minn. L. Rev. 791, 822-23 (1966).

The *Seely* opinion, *supra*, makes it plain that law of warranty recovery for economic loss has not been entirely superseded by strict liability in tort in a commercial setting, that it is inappropriate to hold a manufacturer responsible for the quality of performance of its products in a purchaser's business unless it agrees that the product was designed to meet the purchaser's demands, and that the risk that the product will not meet the purchaser's economic expectations may fairly be charged to the purchaser unless the manufacturer agrees that it will bear that risk. There was no such agreement in this case.

[14]See, *e.g.*, *Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 130 F.2d 582 (9th Cir. 1942); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.*, 201 F. Supp. 191 (N.D. Ohio 1961); *Wallich Ice Machine Co. v.*

generator unit is a highly specialized, custom-built piece of machinery, built to particular specifications and tested in the factory before delivery, under supervision of engineers representing both parties.

The circumstances of this case do not bring the plaintiff within the class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved support an extension of the doctrine of strict liability in tort to the present facts.[15]

With respect to the issues relating to the formation, interpretation, and validity of the agreements of the parties, the substantive

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Hanewald, 275 Mich. 607, 267 N.W. 748 (1936); *Ford Motor Co. v. Puskar,* 394 S.W.2d 1 (Tex. Civ. App. 1965); *Washington & O.D. Ry. Co. v. Westinghouse Elec. & Mfg. Co.,* 120 Va. 620, 89 S.E. 131 (1916), *reversed in part on rehearing on other grounds,* 91 S.E. 646 (1916).

[15]This conclusion has been confirmed with the decision by the Arizona Court of Appeals on July 27, 1967, of *O. S. Stapley Co. v. Miller* (not yet reported), which holds that the doctrine of strict liability in tort has been adopted in Arizona. The court, however, decided only that "'a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.' *Greenman v. Yuba Power Products, Inc.,* 377 P.2d 897, 900, 27 Cal. Rptr. 697 (1962)." The *Stapley* court also approvingly cited *Rossignol v. Danbury School of Aeronautics,* 227 A.2d 418, 424 (Conn. 1967), in which the Connecticut court, applying the elements set forth in Restatement (Second), Torts § 402 A, required as a basis for recovery that the defective product cause "physical harm to the consumer or user or to his property." 227 A.2d at 424. See also *Bailey v. Montgomery Ward & Co.,* (Ariz. Ct. App., Aug. 17, 1967) (not yet reported). None of these elements is present here.

Arizona substantive law as to this count of the complaint applies where, as here, jurisdiction is based upon diversity of citizenship of the parties and the damages suffered occurred in Arizona. See, *e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941); *Maloy v. Taylor,* 86 Ariz. 356, 346 P.2d 1086 (1959); *Friedman v. Friedman,* 40 Ariz. 96, 9 P.2d 1015 (1932).

law of Pennsylvania is controlling.[16] At all relevant times, the Uniform Commercial Code was there in effect and controls the legal result of the agreements here. The sections of the Code most directly involved are sections 2-204, 2-206, 2-207, and 2-719, relating to the formation of a contract and the ability of the contracting parties to limit their liability for consequential damages.[17]

At all times in the negotiations and in the contract documents, and in the complaint itself, which alleges June 6, 1960, as the contract date, all of the parties operated on the assumption that the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse order acknowledgment form, constituted the contract for the sale of the turbine generator unit. The conduct of the parties during the entire time and up to the filing on August 2, 1967, of plaintiff's "Amendment of Complaint — July 29, 1967", cannot reasonably be explained on any other basis.[18] By

[16]See, e.g., *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941); *Ross v. Ross*, 96 Ariz. 249, 393 P.2d 933 (1964); *Ruby v. United Sugar Companies, S.A.*, 56 Ariz. 535, 109 P.2d 845 (1941); *Schram v. Smith*, 97 F.2d 662 (9th Cir. 1938). All purchase negotiations and documents material to this transaction were executed in Pennsylvania.

[17]This case does not involve any attempted disclaimer of warranties, the subject of Uniform Commercial Code section 2-316. As comment (2) to that section indicates, U.C.C. sec. 2-316(4) provides that questions of limitation of remedy are governed by U.C.C. secs. 2-718 and 2-719, and are "in no way affected by" U.C.C. sec. 2-316, which describes the manner in which the warranties themselves may be modified or excluded entirely from an agreement. 12 A. Purdon's Pa. Stat. Ann. 192, 193 (perm. ed. 1954).

[18]There were experienced purchasing departments, staffs of engineers, and legal departments available to all three companies. Rust has had great experience in purchasing electrical equipment from Westinghouse.

The Rust letter of invitation appended a form of warranty specifically tailored for the Southwest contract. The form of warranty was, setting aside for the moment the consequential damage limitation, substantially the same as the Westinghouse warranty. When the Westinghouse proposal was received, a copy of it was sent to Southwest. Southwest commented upon the proposal, made some technical suggestions, but made no comment or objection as to the form of warranty.

every objective test there was an agreement as to the nature of the contract in effect and its terms and conditions[19] and particularly as to the express warranty involved.

The letter of intent set forth above refers generally to the Westinghouse proposal. There is no reference to any differences intended between the warranty on the back of the purchase order form and of any other warranty intended to be obtained by Rust. Later, when the formal purchase order was sent to Westinghouse, a conditional acceptance was stamped on the purchase order and returned to Rust, the acknowledgment form on the Southwest purchase order not being signed. This recurred with respect to each Southwest purchase order that was submitted. Although there was testimony that Rust generally does not consider that it has a contract until it receives back its own signed acknowledgment form and that Rust always tries to get its own form of acknowledgment signed, in this purchase of $1,137,000 these details apparently were not sufficiently important to delay the transaction.

All purchasing departments involved were familiar with the Westinghouse order and acknowledgment forms. Further, the references to pages 4B and 5B of the original Westinghouse proposal containing the Westinghouse form of warranty by Rust when it changed its purchase orders to provide for erection services and installation of the turbine generator unit in a separate contract is significant as indicating the intentions and expectations of the parties. Other correspondence and testimony before the Court shows that as late as September, 1962, the parties had in mind the Westinghouse warranty with its one-year term, rather than the much broader Southwest warranty of indefinite duration.

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[19]This objective test is consistent with the Uniform Commercial Code, which recognizes that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract," sec. 2-204(1), that an acceptance may be made "in any manner and by any medium reasonable in the circumstances," sec. 2-206(1)(A), and that "a definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional terms," sec. 2-207(1).

The Rust letter of intent was just such a "definite and seasonable expression of acceptance." The letter was a general acceptance, requiring action by Westinghouse in furtherance of the contract, and not expressly made conditional on assent to additional or different terms. Under the Code, therefore, there was a contract between the parties at the time of the Rust letter of intent.

The effect of the July 6, 1960, Southwest purchase order is determined by sec. 2-207(2), and comments (2) and (3) thereto. The additional

The limitation of liability provisions in the Westinghouse proposal and form of acknowledgment are sufficient, under Uniform Commercial Code Sec. 2-719, to limit its liability so as to exclude consequential damages based on breach of contract; there is no evidence before the Court that Westinghouse failed to perform its obligations under its warranty. Westinghouse engineers repeatedly visited the Snowflake mill in response to Southwest's requests in relation to the turbine generator unit. Limitations of liability under Pennsylvania law are valid and enforceable. The parties to an agreement may contract as to limitation of liability resulting from breach of both express and implied warranties.[20] There have been no allegations of unconscionability, and there was no personal injury; this turbine generator unit can hardly be considered "consumer goods", within the meaning of section 2-719. Although liability for consequential damages resulting from negligence was not expressly limited in the Westinghouse form of warranty, the provision limiting liability so as to exclude consequential damages is sufficiently broad also to limit liability resulting from negligence and, in particular, to limit

terms are to be construed as proposals for additions to the contract. The additional terms here, paragraphs (2) and (12) of the Southwest purchase order, never became a part of the contract because: (1) The original Westinghouse offer expressly limited acceptance to its terms; (2) the proposed additional warranty constituted a material alteration to the prior agreement; and (3) the proposed terms were uncontrovertedly rejected by the Westinghouse stamp affixed to the face of the purchase order form that referred to a form of acknowledgment that Rust had previously received, confirming the warranty contained in the formal proposal and its covering letter, as to which there never was any objection.

[20]See, *e.g.*, *Eimco Corporation v. Joseph Lomardi & Sons*, 193 Pa. Super. 1, 162 A.2d 263 (1960); *Bechtold v. Murray Ohio Mfg. Co.*, 321 Pa. 423, 184 A. 49 (1936); *Magar v. Lifetime, Inc.*, 187 Pa. Super. 143, 144 A.2d 747 (1958); *Shafer v. Reo Motors, Inc.*, 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd.* 205 F.2d 685 (3rd Cir. 1953). *See generally National Steel Corp. v. L. G. Wasson Coal Mining Corp.*, 338 F.2d 565 (7th Cir. 1964); *American Can Company v. Horlamus Corp.*, 341 F.2d 730 (5th Cir. 1965); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.*, 201 F. Supp. 191 (N.D. Ohio 1961); 5 Bender's U.C.C. Serv. sec. 7.03[3], at 7-48 (1966).

liability to replacements required as the result of faulty workmanship.[21] Under these facts there also can be no recovery for consequential damages based upon a theory of negligence, apart from a contractual duty.[22] Any remedy for breach of the duty of repair under the warranty was similarly limited to repair and replacement of defective materials and workmanship for a period of one year.

To summarize, the Court is of the opinion that: (1) the documents constituting the contract between Westinghouse and Southwest with respect to the sale of the turbine generator unit were the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse form of acknowledgment; (2) the effect of these documents and of the conduct of the parties with respect thereto is to include the Westinghouse form of warranty and limitation of liability as a part of the agreements of the parties; (3) the terms of the Westinghouse form of warranty and limitation of liability under Pennsylvania law are sufficient to

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[21]See, *e.g., Shafer v. Reo Motors*, 205 F.2d 685 (3rd Cir. 1953); *Charles Lachman Co. v. Hercules Powder Co.*, 79 F. Supp. 206 (E.D. Pa. 1948); *Cannon v. Bresch*, 307 Pa. 31, 160 A. 595 (1932); *Atherton v. Clearview Coal Co.*, 267 Pa. 425, 110 A. 298 (1920); *Wright v. Sterling Land Co.*, 157 Pa. Super. 625, 43 A.2d 614 (1945); *Siegel Co. v. Philadephia Record Co.*, 348 Pa. 245, 35 A.2d 408 (1944); *Mayo v. McCoskey & Co.*, 200 F. Supp. 7 (E.D. Pa. 1961). *See generally Fire Association of Philadelphia v. Allis Chalmers Mfg. Co.*, 129 F. Supp. 335 (N.D. Iowa 1955).

[22]See, e.g., *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903); *Stevenson v. East Ohio Gas Co.*, 47 Ohio L. Abs. 586, 73 N.E.2d. 200 (1946); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Polo v. Adelbrau Brewery*, 185 Misc. 775, 60 N.Y.S. 2d 346 (App. Term 1946); *City of Oxford v. Spears*, 228 Miss., 433, 87 So.2d 914 (1956); *see generally* Restatement (Second), Torts sec. 388 et seq.; 1 Harper & James, *Torts*, sec. 6.10, at 509-10 (1956); *compare Southern Pac. R. Co. v. Gonzales*, 48 Ariz. 260, 61 P.2d 377 (1936). For a discussion of the application of such authorities in the determination of Arizona law, see generally Ulrich, *Federal Diversity Jurisdiction—The Problem of Ascertaining Applicable State Law in the Absence of State Authorities*, Arizona Weekly Gazette, p. 3, Col. 1, May 9, 1967.

limit Westinghouse liability so as to exclude recovery of consequential damages resulting from breach of express or implied warranty or from negligence, in the manufacture, installation, and repair of the turbine generator unit; (4) the damages claimed to have been suffered by the plaintiff in this case are consequential damages within the meaning of the Westinghouse form of warranty and Uniform Commercial Code Sec. 2-719; (5) on the facts of this case, there can be no recovery based upon a theory of strict liability in tort; and (6) there is no separate tort duty, apart from a duty based on contract, to compensate the plainiff for the consequential losses that it claims to have suffered.

For these reasons, therefore, there being by agreement of counsel no genuine issue as to any material fact, the Court has entered its order granting defendant's motions for partial summary judgment.

Dated this 7th day of September, 1967.

/s/ WM. P. COPPLE
Wm. P. Copple
United States District Judge.